Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8

MEMORANDUM OPINION AND SECOND ORDER ON RECONSIDERATION

Adopted: December 7, 2000 Released: January 19, 2001

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. In this order, we resolve various petitions for reconsideration of the *Report and Order* in this proceeding,[1] in which we amended our local TV multiple ownership rule and the radio/TV cross-ownership rule, and adopted grandfathering policies for certain television local marketing agreements and radio/TV combinations. We also clarify certain aspects of the *Report and Order* on our own motion.

II. BACKGROUND

2. This proceeding is a broad and complex one involving several of the Commission's policies and rules on the cross-ownership and multiple ownership of broadcast stations. It began in 1991, and involved a series of notices, the most recent of which was guided by the Telecommunications Act of 1996.[2] In the proceeding, the Commission has attempted to balance two of its most fundamental goals in broadcast ownership – fostering competition in the markets in which broadcast stations compete, and preserving a diversity of information sources, especially at the local level – with the efficiencies of common ownership and increased competition in the media

[1] Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, MM Docket Nos. 91-221, 87-8, *Report and Order*, 14 FCC Rcd 12903 (1999) (*Report and Order*).

[2] In MM Docket No. 91-221, the Commission released a *Notice of Inquiry*, 6 FCC Rcd 4961 (1991), a *Notice of Proposed Rulemaking*, 7 FCC Rcd 4111 (1992), a *Further Notice of Proposed Rulemaking*, 10 FCC Rcd 3524 (1995), and a *Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21655 (1996). The proceeding originally included a review of not only the local TV multiple ownership rule and the radio/TV cross-ownership rule, but also several other ownership rules, such as the national TV ownership rule, but the review of these other rules ultimately became the subject of separate proceedings.

marketplace. Harmonizing these concerns in the *Report and Order*, we amended the local TV multiple ownership rule, the radio/TV cross-ownership rule, and our standards for presumptive waiver of these rules. We also grandfathered certain television local marketing agreements (LMAs) that we determined were attributable ownership interests in a companion proceeding,[3] as well as certain radio/TV combinations that were formed pursuant to waivers conditioned on the outcome of this proceeding.

3. The Commission's previous local television multiple ownership rule, or "TV duopoly rule," prohibited common ownership of two TV stations when the Grade B contours of the stations overlapped. Our amended rule allows a party to own TV stations licensed to communities in different Designated Market Areas (DMAs) without regard to contour overlap. Our rule also permits a party to own two TV stations in the same DMA, if at least one of the stations is not among the four highest-ranked stations in the market, and at least eight independently owned and operating full-power broadcast TV stations would remain in the DMA after the proposed combination. In addition, we presume it is in the public interest to waive the amended rule if one of the stations in a proposed combination is a failed or failing station, or is not yet constructed. Once formed, whether pursuant to the amended duopoly rule or waiver standard, a combination may not be transferred unless it meets the rule or waiver standard in effect at the time of transfer.

4. The Commission's previous radio/TV cross-ownership rule generally prohibited common ownership of a radio and TV station in the same geographic area. Our amended rule permits a party to own, in the same geographic area, one TV station (or two TV stations, if permitted by the duopoly rule) and: (a) up to six radio stations, if at least twenty independently owned media "voices" would remain in the market post-combination (or one TV station and seven radio stations in circumstances where a party could own two TV stations and six radio stations); (b) up to four radio stations, if at least ten independently owned media voices would remain in the market post-combination; and (c) one radio station, without regard to the number of independently owned media voices that would remain in the market post-combination. For purposes of the new rule, we count the following as media voices in the market: (a) radio stations, (b) TV stations, (c) cable systems, as one entity, if a cable system is generally available in the DMA, and (d) certain daily newspapers. We also presume it is in the public interest to waive the amended radio/TV cross-ownership rule if one of the stations in a proposed combination is a failed station. Once formed, whether pursuant to the amended radio/TV cross-ownership rule or waiver standard, a combination may not be transferred unless it satisfies the rule or waiver standard in effect at the time of transfer.

5. In our companion *Attribution Report and Order*, we concluded that a same-market LMA constitutes an attributable ownership interest for the brokering station if that station brokers more than 15% of the brokered station's broadcast hours per week.[4] Consistent with our proposal in the *Second Further Notice*, in the *Report and Order* we grandfathered LMAs that do not comply with our TV duopoly rule, if entered into prior to the adoption date of the *Second Further Notice*, *i.e.*,

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[3] Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51, and Reexamination of the Commission's Cross-Interest Policy, MM Docket No. 87-154, *Report and Order*, 14 FCC Rcd 12559 (1999) (*Attribution Report and Order*), *on recon.*, FCC 00-438 (rel. Jan. 18, 2001) (*Attribution Reconsideration Order*). An LMA or a time brokerage agreement is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot advertisements that support the programming. *See Report and Order*, 14 FCC Rcd at 12958, ¶ 126.

[4] *Attribution Report and Order*, 14 FCC Rcd at 12597, ¶ 83.

November 5, 1996. We grandfathered these LMAs through the conclusion of our 2004 biennial review.[5] We required LMAs entered into on or after the adoption date of the *Second Further Notice* to comply with our new TV duopoly rule within two years of the adoption date of the *Report and Order*. We also grandfathered certain radio/TV combinations formed pursuant to waivers that were conditioned on the outcome of this proceeding, if the waivers were applied for on or before July 29, 1999, and ultimately approved by the Commission.

6. We have received fourteen petitions for reconsideration of the *Report and Order*.[6] These petitions seek reconsideration of both the TV duopoly rule and the radio/TV cross-ownership rule, as well as our grandfathering policies for television LMAs and waivers of the radio/TV cross-ownership rule that were conditioned on the outcome of this proceeding. Below, we address these petitions for reconsideration, and clarify on our own motion certain aspects of the *Report and Order*.

III. DISCUSSION

A. Local Television Multiple Ownership Rule

7. Petitioners seek reconsideration of virtually all aspects of our amended TV duopoly rule – its geographic scope, the requirement that one of the stations not be among the four highest-ranked stations in the DMA, the requirement that eight independently owned stations remain in the DMA post-combination, and our presumptive waiver policies. We consider the petitions below.

1. Geographic Scope

8. Background. As indicated above, we concluded in the *Report and Order* to modify our rule that disallowed common ownership of two TV stations if their Grade B contours overlapped. Instead, we decided to permit common ownership of two TV stations if they are licensed to communities in different DMAs.[7]

9. Discussion. UCC asks us to reconsider our decision.[8] UCC contends that DMAs can change and be manipulated by private parties since they are not controlled by the Commission, and

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[5] Section 202(h) of the Telecommunications Act of 1996 requires the Commission to review its broadcast ownership rules biennially to "determine whether any of such rules are necessary in the public interest as the result of competition," and to "repeal or modify any regulation it determines to be no longer in the public interest."

[6] The petitioners, and the abbreviated names by which they are referred to in this order, are identified in Appendix A. Prior to addressing these petitions for reconsideration in the instant order, we issued our first order on reconsideration in this docket. *See Order on Reconsideration*, 14 FCC Rcd 20571 (1999). This first order on reconsideration established the manner in which we process applications for TV duopolies and radio/TV combinations filed on the same day, not all of which could be granted, consistent with the voice counts in our revised TV duopoly and radio/TV cross-ownership rule.

[7] To ensure that our new rule is not more restrictive than our previous rule, we also permit two TV stations in the same DMA to combine if their Grade B contours do not overlap. *Report and Order*, 14 FCC Rcd at 12928-12929, ¶ 53. Such a combination would have been permissible under the previous rule.

[8] UCC at 4-13.

may not always be based on viewership patterns. Commenters have already fully debated the issue of the geographic scope of the duopoly rule,[9] and we considered and resolved this issue in the *Report and Order.*[10] We explained that DMAs reflect actual viewing patterns, and define the "market" in a manner that is widely accepted and used by the advertising and broadcasting industries.[11] Nielsen Media Research collects viewing data from TV households four times a year, assigns a particular county to a DMA if a majority of the viewing in that county is of stations located in the DMA, and then uses the viewing data to compile DMA-based ratings for TV shows. Advertisers use this data to make advertising decisions, and broadcasters use this data to make programming decisions. The DMA therefore reflects viewership patterns, and serves as the proper basis by which to define the geographic area for our TV duopoly rule. We recognize that a broadcast station may have an incentive to manipulate its DMA assignment in order to combine two stations, but Nielsen Media Research defines DMAs, and we believe that advertisers and competing broadcasters that rely on DMAs to make advertising and programming decisions have an incentive to ensure that DMA assignments are accurate and reliable. This does not mean that DMA assignments will not change, but will do so in response to marketplace changes. We believe this is a desirable feature of our new rule. Accordingly, we reaffirm our decision to allow two broadcast TV stations to combine if they are located in different DMAs, without regard to contour overlap.[12]

2. Market Rank/Eight Voice Test

10. Background. As indicated above, our new TV duopoly rule permits one party to own two stations within the same DMA, if two conditions are satisfied. At least one of the stations must not be ranked among the top four stations in the DMA, as determined by all-day audience share at the time the application to combine is filed, and at least eight independently owned and operating full-power broadcast TV stations must remain post-combination.

11. Discussion. *Market Rank.* Sinclair asks us to reconsider the requirement that at least one of the TV stations in a proposed duopoly not be among the top four stations in the DMA.[13] Sinclair argues that the requirement "makes little sense because, pragmatically, if a single entity owns two of the top stations in a market, it will not program them with the same material. Furthermore, network affiliates have little ability to make substantial changes to network programming."[14] Sinclair thus appears to argue that the requirement does not promote programming diversity. We are not persuaded that common ownership will have no adverse effect on program diversity, as Sinclair suggests. Moreover, Sinclair overlooks that we seek to promote both competition and

[9] *See Report and Order*, 14 FCC Rcd at 12924-12925, ¶¶ 43-46.

[10] *Id.* at 12926-1929, ¶¶ 47-53.

[11] *Id.* at 12926, ¶¶ 47-48.

[12] UCC expresses concern "that the lack of public access to A.C. Nielsen data will impede effective review of proposed transfers." UCC at 10. As a practical matter, applicants generally submit the necessary data from Nielsen Media Research and/or other sources to support their applications, and when they do not, the Mass Media Bureau requests that they do so. Once submitted to the Commission, this information is publicly available.

[13] Sinclair at 11.

[14] *Id.*

diversity with the TV duopoly rule, as we do with all of our multiple ownership rules.[15] As we explained in the *Report and Order*, "[t]he 'top four ranked station' component of this standard is designed to ensure that the largest stations in the market do not combine and create potential competition concerns. These stations generally have a large share of the audience and advertising market in their area, and requiring them to operate independently will promote competition."[16] Because larger stations generally produce local news while smaller stations often do not, we also explained that the requirement that both stations not be among the top four ranked stations did not harm, and in fact furthered, our diversity goal, if the combination made it possible for the smaller station to produce local news. We thus believe that our decision to require that at least one of the stations in a proposed duopoly not be among the top four ranked stations in the DMA properly harmonizes our competition and diversity goals, and we reject Sinclair's position to the contrary.

12. We also clarify, on our own motion, how to resolve a tie for market rank. Nielsen Media Research often provides audience share in whole numbers, with the result that two stations have the same audience share. In such cases, we will require duopoly applicants to submit more detailed information on audience share (*i.e.*, estimates with a sufficient number of decimal places) to resolve the tie.

13. *Number of Broadcast TV Stations*. A number of petitioners ask us to reconsider our decision to require that eight independently owned and operating broadcast TV voices remain in the DMA post-merger. Petitioners generally contend that we did not sufficiently explain our rationale for selecting the number eight,[17] and that the requirement does not allow combinations in smaller markets, where broadcasters may be most in danger of failing unless they are permitted to form duopolies and realize the efficiencies associated with combinations.[18] No petitioner argues that we adopt a particular number other than eight, however.

14. We reaffirm our decision to require that eight broadcast TV stations remain in the market post-combination.[19] We explained our competition and diversity goals in some detail in the *Report and Order*,[20] and stated that the requirement that eight TV broadcast stations remain in the DMA post-merger "strikes what we believe to be an appropriate balance between permitting stations to

[15] We recognize that Sinclair, along with several other commenters, argues that the Commission should not consider competition concerns. Sinclair at 11-12. The Commission, however, has historically considered competition in its public interest analysis.

[16] *Report and Order*, 14 FCC Rcd at 12933.

[17] ALTV at 12-13; Blade at 18-19; LSOC 3-4; Paxson at 17-18; Sinclair at 6-7.

[18] ALTV at 28-30; Blade at 22-23; LSOC at 17-18; NAB at 3-6; Paxson at 21-22; Pegasus at 28-31; Sinclair at 7-8.

[19] As we stated in the *Report and Order*, the requirement that eight broadcast TV voices must remain in the DMA post-merger ordinarily will mean that nine such voices must be present in the DMA pre-merger. *See, e.g.*, 14 FCC Rcd at 12935, ¶ 70. The only exception to this general rule would be where the stations in a proposed duopoly are already parties to an attributable TV LMA in the DMA; under these circumstances, for purposes of the duopoly rule, only eight independently owned TV stations exist in the DMA, but the party could convert its LMA to a duopoly because that event would not affect the number of independently owned broadcast TV stations in the DMA. This is because the LMA relationship is already considered one voice. *See, e.g.*, *id.* at 12934, ¶ 67.

[20] *Id.* at 12911-12917.

take advantage of the efficiencies of television duopolies while at the same time ensuring a robust level of diversity."[21] As we stated in the *Report and Order*, "[o]ur decision today is an exercise in line drawing – perennially one of the most difficult yet inevitable challenges facing a government agency."[22] We continue to believe that drawing the line at eight reasonably balances the competing interests at stake.

15. We reject the argument that our requirement that eight broadcast TV stations remain in the DMA post-combination inappropriately or unfairly disadvantages stations in smaller markets because of an alleged impossibility of sustaining a full complement of stations in such markets due to economic realities.[23] As discussed in the *Report and Order*, we recognize that stations in smaller markets will not be able to take advantage of our new rule. We explained, however, that "we believe this is appropriate given that these markets start with fewer broadcast outlets, and thus a lower potential for providing robust diversity to viewers in such markets.... [I]t is in these small markets that consolidation of broadcast television ownership could most undermine our competition and diversity goals."[24] Petitioners' concerns that stations in smaller markets are in danger of failing is addressed by our waiver policies, under which we presume it is in the public interest to waive the duopoly rule if a station fails or is in danger of failing.[25] As we explained in the *Report and Order*, "the three waiver standards we adopt today . . . will, consistent with our competition and diversity goals, provide relief in a more tailored fashion for stations in smaller markets that are unable to compete effectively."[26] Because we have concluded that a diversity "floor" of eight stations serves our competition and diversity goals, we likewise decline to adopt the sliding scale proposed by UCC, which would require a greater number of broadcast stations in DMAs with greater populations.[27] We do not believe that certain populations should have more or less competition and diversity than other populations.

16. While we generally affirm the use of DMAs in determining the number of stations in a particular market, we will modify our decision in one respect.[28] Under the current rule, all

[21] *Id.* at 12934, ¶ 67.

[22] *Id.* at 12923, ¶ 40.

[23] ALTV at 28-30; Blade at 22-23; LSOC at 17-18; NAB at 3-6; Paxson at 21-22; Pegasus at 28-31; Sinclair at 7-8.

[24] *Report and Order*, 14 FCC Rcd at 12935, ¶ 70.

[25] For example, we note that Pegasus suggests that we permit duopolies in "smaller markets" whenever a second, separately programmed station is added to the market or rescued from bankruptcy. *See* Pegasus at 37-38. We believe that we have already generally accommodated this request in our waiver standards because we presume it is in the public interest to permit a duopoly if the applicant can show that one of the stations "is a debtor in an involuntary bankruptcy" or that "the combination will result in the construction of an unbuilt station." 47 C.F.R. § 73.3555 note 7. Under all our waiver standards, however, we require an applicant to show that "the in-market buyer is the only entity ready, willing, and able to operate the station, [and] that sale to an out-of-market applicant would result in an artificially depressed price." 47 C.F.R. § 73.3555, note 7. To the extent Pegasus asks us to eliminate these additional requirements, we decline to do so, as explained in section III.A. 3.

[26] *Report and Order*, 14 FCC Rcd at 12935, ¶ 70.

[27] UCC at 15-16.

[28] The text of our revised TV duopoly rule is set forth in Appendix B.

independently owned and operating, full-power TV stations in a DMA (whether commercial or non-commercial) count toward the eight-station minimum. As UCC points out, however, there are some geographically large DMAs where counting every station in the DMA may produce results at odds with our goal of establishing a minimum level of independent voices in a particular community.[29] For instance, the Miami-Ft. Lauderdale DMA contains a total of 14 independent full-power TV stations. But two of those stations are licensed to Key West, Florida, approximately 120 miles from Miami. Because of the distance, neither of the Key West stations has a Grade B signal contour that overlaps with the Grade B contours of any of the other stations in the market, all of which transmit from or near Miami. In a situation such as this, we do not believe that the Key West stations constitute an independent "voice" to Miami viewers, nor do the Miami stations constitute an independent "voice" to viewers in Key West. However, under our current rules, a single owner could own the only two TV stations serving Key West by relying on the 12 stations in Miami, even though a viewer in Key West could not receive any of the Miami signals. Similarly, a potential combination in the Miami area could count the Key West stations as "voices" in the Miami market even though neither of those stations reaches the Miami area.

17. We therefore will modify our duopoly rule as follows. In counting the number of independently owned and operating, full-power stations in a market for purposes of our rule, we will count only those stations whose Grade B signal contour overlaps with the Grade B contour of at least one of the stations in the proposed combination.[30] This new rule will help strengthen our eight-voice diversity floor in geographically large DMAs.

18. This new rule is consistent with our overall duopoly rule, which has always permitted common ownership of stations with no Grade B overlap. Indeed, in the *Report and Order*, we held that even though we were moving to a duopoly prohibition based on DMAs rather than contour overlap, we would still permit combinations between stations in the same DMA, regardless of the number of voices available, so long as there was no Grade B overlap.[31] Where there was no Grade B overlap, we found that permitting stations to combine would not threaten our goal of preserving a minimum level of competition and diversity. Having reached that conclusion, we believe that its converse is also valid: if two stations with no Grade B overlap have so little impact on competition and diversity in the other's market that they should be permitted to combine, then neither should they be able to rely on the other as a source of competition and diversity in proposing to combine with a third station.

19. Finally, in the interest of consistency, we will adopt a similar modification of our one-to-a-market rule.[32] Currently, we count all independently owned and operating, full-power TV stations in the same DMA as the TV station at issue as additional "voices" in the market. We will modify that rule to provide that only those independently owned and operating, full-power TV stations in the same DMA as the TV station(s) at issue, *and that have a Grade B signal contour that overlaps with the Grade B contour of the TV station(s) at issue*, will count as additional "voices" in the market.

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[29] UCC at 8.

[30] In this context, we will not consider satellite stations or translators in determining a station's Grade B signal contour.

[31] *Report and Order*, at ¶¶ 50-53.

[32] The text of our revised radio/TV cross-ownership rule is set forth in Appendix B.

20. *Exclusion of Media Other than Broadcast TV Stations*. Many commenters ask that if we continue to require that eight independently owned "voices" remain in the DMA post-combination, we count a host of other media, or at a minimum cable systems, newspapers, and radio stations, consistent with our modified radio/TV cross-ownership rule.[33] On the other hand, UCC asks us not to count noncommercial stations.[34]

21. We first reaffirm that we will count both commercial and noncommercial operating TV stations in the DMA. Although, as UCC argues, noncommercial stations do not compete for advertising dollars, they do contribute to diversity. We recognize, as UCC points out, that the signal of noncommercial stations may not reach all over-the-air viewers in a DMA. The same may be said, however, of *any* broadcast TV station in a DMA. In addition, this argument overlooks the possible extension of the broadcast TV station's signal through carriage by a multichannel video programming distributor, such as cable. Indeed, in modifying our duopoly rule, we explained that "DMAs reflect the fact that a station's audience reach, and hence its 'local market,' is not necessarily coextensive with the area of its broadcast signal coverage. For example, a station's over-the-air reach can be extended by carriage on cable systems and other multichannel delivery systems, as well as through such means as satellite and translator stations."[35] We thus believe that any categorical exclusion of noncommercial stations is unwarranted.

22. We also reaffirm our decision *not* to count media other than broadcast TV stations. The issue of whether to count other media entities for purposes of the TV duopoly rule has been debated already,[36] and was resolved in the *Report and Order*.[37] We explained that we had decided to count only broadcast TV stations because these stations are the primary source of news and information for a majority of Americans, and also because the record was not clear on the extent to which other media are substitutes for broadcast TV.[38] We reaffirm both our decision to count only broadcast TV stations, and our rationale for doing so. Broadcast TV has the power to influence and persuade unmatched by other media. In terms of our diversity goal, we emphasize that TV is the dominant source of news and information for Americans, and in the world of television, broadcast TV stations are the dominant source of *local* news and information. Other video programming distributors, such as cable and DBS, typically do not serve as *independent* sources of local information; most of any local programming they provide is originated by a broadcast station.[39] We thus reaffirm that, in applying the eight voice standard, we will only count broadcast TV stations.

[33] Aries at 13-14 (cable systems); ALTV at 2, 26-27 (cable systems, DBS sitemaps, MMDS systems, magazines); Blade at 12-15 (cable systems, newspapers, and radio stations); LSOC at 15-16 (cable systems); LSOC Opposition at 18-19 (cable systems, websites); NAB at 7-11 (cable systems, DBS systems, MMDS systems, magazines, Open Video Systems, SMATV systems, websites); Paxson at 13-16 (cable systems, newspapers, radio stations, websites); Sinclair at 8-9 (cable systems, Digital Video Discs, VCRs).

[34] UCC at 13-14.

[35] *Report and Order*, 14 FCC Rcd at 12926-12927, ¶ 48.

[36] *Id.* at 12932, ¶ 62 (noting that some commenters argued that the Commission should count broadcast and nonbroadcast media outlets in a market).

[37] *Id.* at 12934-12935, ¶¶ 68-69.

[38] *Id.*

[39] For example, most locally originated programming available on cable is provided by a local broadcast station, and is either available over-the-air, or produced especially for cable by the broadcast station. In either case, such programming is not an independent source of local information. *See* UCC Opposition at 3-5.

23. Clear Channel argues that, in counting broadcast TV stations in a DMA, we should include those not licensed in the DMA but with a reportable share in the DMA.[40] To serve our competition goal, we have defined the geographic scope of our new duopoly rule with reference to DMAs only, because the DMA is the accepted measure of the market in the broadcast TV industry. We agree with UCC that counting stations outside the DMA undercuts the rationale for our decision to adopt the market-based DMA approach.[41] We believe it would be inconsistent with this approach to consider stations in different DMAs to be in separate markets for one purpose (*i.e.*, the triggering circumstances of the duopoly rule), but consider them to be in the same market for another purpose (*i.e.*, counting voices). We recognize, as Clear Channel points out,[42] that in counting radio stations for purposes of the radio/TV cross-ownership rule, we include those with a reportable share in the radio market. However, DMAs typically cover much larger geographic areas than radio markets, so that a TV station with a reportable share in a DMA may serve a much smaller portion of that market than a radio station with a reportable share in a radio market.

24. In counting broadcast TV stations in the DMA, we also clarify on our own motion that we will not count low power TV (LPTV) stations, including our recently created Class A stations. On March 28, pursuant to the Community Broadcasters Protection Act of 1999, we adopted rules establishing the Class A TV service, which affords certain LPTV stations a form of "primary" status.[43] Given the limited signal coverage of LPTV stations, including Class A stations,[44] we do not believe that they have sufficient influence and power to qualify as a station for purposes of our requirement that eight broadcast TV stations remain in a market post-combination.[45] Thus, we emphasize that the new duopoly rule requires that "at least 8 independently owned and operating *full-power* commercial and noncommercial TV stations" must remain in a DMA post-merger.[46]

3. Waivers

25. Background. In the *Report and Order*, we held that we would presume it would be in the public interest to waive our duopoly rule if one of the two TV stations was a "failed" station, a "failing" station, or an "unbuilt" station. We explained that stations in such circumstances are not meaningful sources of competition and diversity in a given market, such that their combination with another station not only will not erode our competition and diversity goals, but perhaps will generate public interest benefits, such as additional programming.[47] We held that applicants for all

[40] Clear Channel at 2-3; Clear Channel Opposition at 6.

[41] UCC Opposition at 6. In addition, we note that UCC contends that stations outside the DMA typically do not produce local programming for the DMA in question. *Id.*

[42] Clear Channel at 2-3; Clear Channel Opposition at 6.

[43] In the Matter of Establishment of a Class A Television Service, MM Docket No. 00-10, FCC 00-115, *Report and Order* (released April 4, 2000).

[44] The maximum peak effective radiated power (ERP) of analog LPTV stations, including Class A stations, is 3 kW for VHF channels, and 150 kW for UHF channels. 47 C.F.R. § 74.735(a).

[45] We also note that LPTV stations also do not enjoy must-carry rights to the same degree as full-power TV stations. 47 C.F.R. § 73.56(b).

[46] 47 C.F.R. § 73.3555(b)(2)(ii)(emphasis added).

[47] *Report and Order*, 14 FCC Rcd at 12936, ¶ 73; *id.* at 12938, ¶ 79 (failing station waiver); *id.* at 12941, ¶ 85

three of these presumptive waivers must demonstrate that the in-market buyer is the only reasonably available candidate willing and able to operate the station, such that selling a station to an out-of-market buyer would result in an artificially depressed price.[48] In addition, we held that, to qualify for a "failed" station waiver, applicants must demonstrate that one of the stations has been dark for at least four months or involved in involuntary bankruptcy or insolvency proceedings.[49] To qualify for a failing station waiver, applicants must demonstrate that one of the stations has a low all-day audience share and has a poor financial condition, such as negative cash flow for the past three years, and that the merger will produce public interest benefits.[50] To qualify for an "unbuilt" station waiver, applicants must demonstrate that a combination would result in the construction of an authorized but as yet unconstructed station, and that the permittee has made reasonable efforts to construct, but has been unable to do so.[51]

26. Discussion. Several parties ask us to reconsider some of the elements of our presumptive waiver standards, suggesting that they are too burdensome and onerous. For example, ALTV and LSOC contend that our failed and failing waiver standards require too much degradation of service before we will permit duopolies.[52] They, in addition to NAB, also ask us to reconsider our requirement that the in-market buyer is the only reasonably available candidate willing and able to operate a station.[53] NAB asks us, at a minimum, to eliminate this requirement for parties to LMAs.[54]

27. We reaffirm the elements of our presumptive waiver standards. Given the importance of our competition and diversity goals, we believe it is important to ensure that waivers are available only when truly necessary. As we stated in the context of our failed station waiver, "we hope to limit the special relief awarded to failed stations to those situations where this relief is clearly needed."[55] An essential element of proof for us to *presume* that a duopoly is in the public interest – in circumstances where less than eight independent broadcast TV stations will remain post-combination – is that one of the stations is in fact failed, failing, or unconstructed, for legitimate reasons, and that no out-of-market buyer is willing to operate the station, and that sale to such a buyer would result in an artificially depressed price. Were it otherwise, combinations would be permitted that would unnecessarily erode our competition and diversity goals. We do not believe that our requirement pertaining to out-of-market buyers amounts to an inappropriate comparison of potential buyers in violation of section 310(d), as suggested by ALTV, LSOC, and NAB.[56] Rather,

(unbuilt station waiver).

[48] *Id.* at 12937-38, ¶¶ 74, 76 (failed station waiver); *id.* at 12939, ¶ 81 (failing station waiver); *id.* at 12941, ¶ 86 (unbuilt station waiver).

[49] *Id.* at 12937-12938, ¶¶ 75-77.

[50] *Id.* at 12939, ¶ 81.

[51] *Id.* at 12941, ¶ 86.

[52] ALTV at 30-32; LSOC at 19-20.

[53] ALTV at 32-34; LSOC at 20-22; NAB at 17-18.

[54] NAB at 15-16.

[55] *Report and Order*, 14 FCC Rcd at 12938, ¶ 76.

[56] ALTV at 32-34; LSOC at 20-22; NAB at 17-18.

we agree with UCC that "[i]n light of the mechanics of the rule, it is clear that the Commission is not reviewing potential buyers for a particular transfer. The Commission is merely setting forth a bar by which any licensee who wishes to waive past the eight voice/top four ranked standard must pass."[57]

28. We recognize, as several petitioners suggest, that a duopoly waiver applicant that is a party to a several-year-old LMA may not, as a practical matter, now be able to show that at the time it entered into the LMA, it was the only buyer willing and able to operate or construct the failed, failing, or unbuilt station, and that sale of the station to an out-of-market buyer would result in an artificially depressed price. In the *Report and Order*, however, we intended to permit parties to an LMA to make a waiver showing based on the circumstances that existed just prior to their entering into the LMA.[58] We therefore will not require a duopoly waiver applicant that seeks to acquire a station with which it formed an LMA in the past (*i.e.*, prior to the adoption date of the *Report and Order*, in which we announced our new policy) to prove that it was the only buyer willing and able to operate the station, and that sale of the station to an out-of-market buyer would result in an artificially depressed price. We expect such waiver applicants, however, to prove the other elements of the relevant waiver standard.

29. Blade and Paxson ask that we adopt a special waiver standard to allow holders of existing LMAs, especially grandfathered LMAs, to convert those arrangements to duopolies.[59] We reject this proposal. Based on the fact that some parties entered into TV LMAs when the Commission had not expressed any unequivocal policy on them, we believed the equities justified affording certain parties some relief and so grandfathered some LMAs to permit them to remain in existence until at least 2004.[60] These equity concerns have no place, however, in considering whether to grant LMAs special dispensation to convert to duopolies, because the parties never had any reasonable expectation of being able to do so, given the Commission's flat prohibition on duopolies.

30. Through an *ex parte* submission, Pegasus asks us to clarify that a station's demonstrated inability to fund the build-out of its DTV facilities on its own is, standing alone, satisfactory evidence that the station is failing.[61] As indicated, all of our waiver standards require duopoly applicants to show that one of the stations is the only entity ready, willing, and able to operate the other station, and that sale to another buyer would result in an artificially depressed price.[62] In addition, our failing station standard requires applicants to show that one of the stations has an all-day audience share of no more than four per cent and has had negative cash flow for three consecutive years immediately prior to the application, and that consolidation of the stations would result in tangible and verifiable public interest benefits that outweigh any harm to competition and diversity.[63] We clarify that DTV transition costs are relevant to our consideration of whether a

[57] UCC Opposition at 9.

[58] *Report and Order*, 14 FCC Rcd at 12965, ¶ 147.

[59] Blade at 23-24; Paxson at 22.

[60] *Report and Order*, 14 FCC Rcd at 12964-12965, ¶ 144.

[61] Letter from R. Clark Wadlow and Thomas P. Van Wazer, Counsel to Pegasus Communications Corporation, to Magalie Roman Salas, Secretary, FCC, Attachment at 2 (Sept. 15, 2000).

[62] 47 C. F.R. § 73.3555 Note 7.

[63] 47 C.F.R. §73.3555 Note 7(2).

station is failing, in that we will consider how these costs have affected a station's cash flow, and whether consolidation with another in-market station would result in demonstrable public interest benefits, such as expedited and improved DTV service. This is consistent with our standards for re-evaluation of grandfathered LMAs in 2004, which include consideration of "the extent to which one station has enabled the other to convert to digital operations, and whether joint operation has expedited that conversion, as well as produced more over-the-air programming using digital transmission."[63] We decline, however, to adopt a policy holding that a station's difficulty in funding its DTV transition is tantamount to its failing under all circumstances. The other elements of our waiver standards are necessary to protect our competition and diversity goals.

31. Kenkel asks us to permit combinations without a waiver where the duopoly involves an authorized but unconstructed station.[64] We decline to do so. Given the fact-intensive nature of the criteria for waiver, we continue to believe that duopolies should be permitted without regard to voice counts not by rule, but by waiver.

32. Public interest groups ask that we reconsider our presumptive waiver standards as well. UCC asked that we eliminate our failing and unbuilt station standards for waiver of our duopoly rule, since among other reasons these standards are not available for waiver of our radio/TV cross-ownership rule.[65] We reaffirm our decision. As we explained in the *Report and Order*, we amended our duopoly and radio/TV cross-ownership rules to differing degrees, and our standards for presumptive waiver vary accordingly.[66] We amended our duopoly rule to a lesser extent than our radio/TV cross-ownership rule, but offered more standards for presumptive waiver of our duopoly rule than for our radio/TV cross-ownership rule. Our overall approach to the duopoly and radio/TV cross-ownership policies is consistent. We have simply struck the balance between combinations allowable by rule and those allowable by waiver at different points. Agencies have the discretion to decide whether to establish their policies through a case-by-case method or through rulemaking,[67] and thus we have struck the balance between these two methods in the manner that we believe best serves the public interest.

33. MMTC also asks that we require applicants for duopoly waivers to provide "socially and economically disadvantaged small business concerns" (SDBs) with reasonable notice of a station's availability, or offer expedited processing to duopoly-eligible licensees that voluntarily marketed to SDBs.[68] We decline to do so. While we are concerned about minority ownership, we believe, as we stated in the *Report and Order*, and as we state in our companion *Attribution Reconsideration Order*, initiatives to enhance minority ownership should await the evaluation of various studies sponsored by the Commission.[69]

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[63] 14 FCC Rcd at 12966, ¶ 148.

[64] Kenkel at 2-5.

[65] UCC at 21-22.

[66] *Report and Order*, 14 FCC Rcd 12955, ¶ 118.

[67] *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

[68] MMTC at 12-15.

[69] *Report and Order*, 14 FCC Rcd at 12910, ¶ 13; *Attribution Reconsideration Order*, FCC 00-438, ¶ 24. These studies include: Christine Bechen, Allen Hammond, and Laurie Mason, *Diversity of Programming in the Broadcast Spectrum: Is There a Link Between Owner Race or Ethnicity and News and Public Affairs*

4. Transferability

34. Background. In the *Report and Order*, we stated that, once formed, a duopoly could not be transferred unless it complies with the duopoly rule or waiver standard in effect at the time of transfer.[70] This is the case whether the combination was formed in the first instance pursuant to the duopoly rule or waiver.

35. Discussion. ALTV, LSOC, NAB, and Sinclair ask us to eliminate our restrictions on transfer, claiming that the transfer of these previously-approved combinations cannot affect our competition and diversity goals, and that the restrictions may interfere with investment in broadcast stations.[71] Pegasus asks that we eliminate the restrictions for smaller markets.[72] Various other petitioners ask that we permit the transfer of duopolies on certain conditions.[73]

36. We reaffirm our decision not to permit the transfer of a duopoly, unless it meets a rule or waiver standard in effect at the time of transfer. Petitioners such as NAB are correct that we would not have permitted these combinations in the first instance unless we concluded that they did not compromise our competition and diversity goals at that time. But marketplace factors change over time. For example, suppose that a TV station seeks to buy a second station, pursuant to a failed station waiver, in a DMA where there are six independently owned TV stations. We approve the transaction, such that five independent TV stations remain. A TV station in the DMA then goes off the air, with the result that there are four independent stations in the DMA. Several years later, the combination has rehabilitated the previously failed station, and a station group with a national presence but no stations in the same market as the combination seeks to acquire the combination. Section 309(d) requires us to evaluate whether this transfer serves the public interest, convenience, and necessity. We believe the answer to this statutorily-mandated inquiry is more complicated than simply acknowledging that we approved the combination in the past, at a time when the marketplace was significantly different. We recognize that the mere transfer of a combination may or may not adversely affect the competition and diversity dynamics in the market. We believe, however, that we struck the appropriate balance in harmonizing marketplace changes with our bedrock competition and diversity goals by not requiring combinations to divest stations with the ebb and flow of the market, but requiring them to comply with our rules and waiver policies at the time of transfer. We are especially concerned with maintaining competition and a diversity "floor" in smaller markets, and thus decline to adopt Pegasus' suggestion that we allow parties to transfer

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Programming? (Dec. 1999); William H. Bradford, *Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes* (Dec. 5, 2000); Ernst & Young LLP, *FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions* (Dec. 5, 2000); Ivy Planning Group LLC, *Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present* (Dec. 2000); KPMG LLP Economic Consulting Servs., *Study of the Broadcast Licensing Process* (Nov. 2000); KPMG LLP Economic Consulting Services, *Utilization Rates, Win Rates, and Disparity Ratios for Broadcast Licenses Awarded by the FCC* (Nov. 2000). The studies are available at the Commission's website at the following location: <www.fcc.gov/opportunity/meb_study>.

[70] *Report and Order*, 14 FCC Rcd at 12933, ¶ 64; *id.* at 12938, ¶ 77; *id.* at 12940, ¶ 81; *id.* at 12941, ¶ 86.

[71] ALTV at 35-37; LSOC at 22-24; NAB at 19-21; Sinclair at 11.

[72] Pegasus at 39.

[73] *See infra* ¶ 31.

duopolies in those markets without regard to our rules or waiver policies. We reaffirm our decision to prohibit transfers of duopolies, unless they comply with our rule or waiver policies at the time of transfer.[74]

37. Several commenters ask us to adopt additional exceptions to our transfer policy, on the same bases commenters asked us to adopt additional exceptions to our waiver policies. For example, Kenkel asks us to allow the transfer of a duopoly if it was created from an unbuilt station waiver;[75] LIN asks us to permit the transfer of a duopoly if it was created from a grandfathered LMA;[76] MMTC asks us to permit the transfer of a duopoly to an SDB.[77] Aries also requests that we allow the transfer of a duopoly if the stations can demonstrate that joint operation has led to public interest benefits, or that sale to separate entities would result in an artificially depressed price.[78] Against the backdrop of reaffirming our duopoly rule, standards for presumptive waiver, and transfer policy, we do not believe that it is appropriate to carve out any additional exceptions to the transfer policy. Rather, we believe that these exceptions, if they have merit, are better examined on a case-by-case basis. As requested by Aries, however, we do wish to clarify the answer to the question of whether duopolies created from LMAs may be transferred through 2004, as the LMAs can be. We clarify that such a duopoly, like any other duopoly, may not be transferred unless it satisfies the rule or waiver standard at the time of transfer. As explained above in the context of our waiver policies, we extended certain relief to grandfathered LMAs, based on the equities of their situation. Parties to grandfathered LMAs formed these arrangements and may have made significant investments in them before the Commission had given clear notice that it intended to attribute LMAs in certain circumstances. These parties, however, could not have formed a reasonable expectation that they could have converted these LMAs to duopolies, since the Commission prohibited duopolies at the time. Accordingly, the equity arguments for maintaining and transferring LMAs do not extend to converting or transferring duopolies created from those LMAs.

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[74] As NAB points out, *see* NAB at 20-21, we note that the Commission, in revising its local radio ownership rules in 1992, decided to permit certain radio combinations if their combined audience share did not exceed 25%, but did not require divestiture at the time of transfer if the audience share then exceeded 25%. *See* Revision of Radio Rules and Policies, MM Docket No. 91-140, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 7 FCC Rcd 6387, 6397, ¶ 48 (1992). We believe, however, that audience share is much more volatile than the number of stations in a market, and so allowing some flexibility in *maximum audience share*, *id.*, is different from allowing flexibility in the *minimum number of stations*. In any event, we also note that the Commission, in holding that it would not generally require divestiture of stations if the audience share exceeded the limits of its revised rule, also stated that "[t]he Commission retains the right, of course, to implement any of a full range of remedies where its analysis suggests that ownership levels in a particular market might threaten the public interest. Such remedies might include . . . the denial of the transfer or assignment of a large station group to a single owner." Revision of Radio Rules and Policies, MM Docket No. 91-140, *Report and Order*, 7 FCC Rcd 2755, 2793 n.109 (1992).

[75] Kenkel at 5-6.

[76] LIN at 1-5.

[77] MMTC at 15-16.

[78] Aries at 6-10.

B. Radio/TV Cross-Ownership Rule

38. We turn next to petitions for reconsideration of our amended radio/TV cross-ownership rule. As with the TV duopoly rule, petitioners have asked us to reconsider many aspects of our policy, including the circumstances that trigger our rule, the application of our voice counts, our standards for presumptive waiver, and our transfer policy.

1. Circumstances that Trigger the Rule

39. Background. In amending the *Report and Order*, we did not change the circumstances that trigger our radio/TV cross-ownership rule. Rather, we stated that "[t]he current one-to-a-market rule, and the rule we adopt today, is triggered by the degree of contour overlap among the stations involved."[79] Thus, the rule is triggered when the Grade A contour of a TV station encompasses the entire community of license of an AM or FM radio station, or when the 2 mV\m contour of an AM radio station, or the 1 mV\m contour of an FM radio station, encompasses the entire community of license of a TV station.[80]

40. Discussion. Several parties ask us to clarify the application of the rule. CBS and Clear Channel ask us to clarify that radio stations, even if encompassed by the Grade A contour of a TV station, do not trigger radio/TV cross-ownership analysis if they are located in separate DMAs from the TV station.[81] Clear Channel and WMTW also ask us to clarify that overlapping contours of a single TV station and several radio stations, if the radio stations are in separate radio markets, constitute several distinct radio/TV combinations, each deserving independent analysis.[82]

41. We clarify as follows. Although the radio/TV cross-ownership rule continues to be triggered by contour encompassment, we generally do not count stations assigned to different markets toward the limits of the rule when applying it. Thus, for purposes of the radio/TV cross-ownership rule, we generally do not count radio stations located in one Arbitron radio market toward the limits on the number of radio stations a party may own in another Arbitron radio market, even when the radio stations in the different markets fall within the Grade A contour of a commonly owned TV station. For example, the recent application to transfer control of CBS Corp. to Viacom, Inc. involved a TV station located in the Baltimore DMA and Arbitron radio metro, the Grade A contour of which encompassed the entire communities of license of several radio stations located in the Washington, DC DMA and Arbitron radio metro. We did not count these several radio stations toward CBS/Viacom's radio/TV ownership limits in the Baltimore market because the stations are not assigned to that market.[83] We *do* count, however, a radio station assigned to one Arbitron radio market toward an entity's ownership limits in a distant market when the contour of the radio station triggers the rule, because the rule continues to be triggered by contour encompassment, and such a radio station has a presence for competition and diversity purposes in the distant market. For

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[79] *Report and Order*, 14 FCC Rcd at 12947, n.159.

[80] 47 C.F.R. § 73.3555(c)(1); 14FCC Rcd at 12947 n.159

[81] CBS at 2-6; Clear Channel Opposition at 8-9.

[82] Clear Channel Opposition at 9-10; WMTW Opposition at 2-3.

[83] Applications of Shareholders of CBS Corp. (Transferor) and Viacom, Inc. (Transferee) for Transfer of Control of CBS Corp. and Certain Subsidiaries, Licensees of KCBS-TV, Los Angeles, CA, *et al.*, *Memorandum Opinion and Order*, FCC 00-155 at ¶ 31 (released May 3, 2000).

example, the recent CBS/Viacom transaction also involved a radio station assigned to the San Francisco DMA and Arbitron radio metro, the 2mV\m contour of which encompassed the entire community of license of a proposed co-owned TV station located in the Sacramento DMA. We counted that San Francisco-based radio station toward CBS/Viacom's radio/TV ownership limits in the Sacramento market because the contour of that radio station triggered the rule.[84] In sum, we clarify that, generally, we do not count toward an entity's radio/TV ownership limits in one market those radio stations assigned to an Arbitron radio market other than the one in which a commonly owned TV station is located. However, we will count toward an entity's radio/TV cross-ownership limits any radio station assigned to an Arbitron radio market other than the one in which a commonly owned TV station is located, if the contour of the radio station triggers the radio/TV cross-ownership rule. Given that contour encompassment continues to trigger the radio/TV cross-ownership rule, we believe it is necessary to recognize that radio stations located in one market in fact have a presence in a distant market, if their contours reach into the distant market and trigger the rule.

2. Application of the Voice Counts

42. Background. In the *Report and Order*, we decided to permit common ownership of one TV station (or two, if permitted by the duopoly rule) and a varying number of radio stations, depending on the number of certain independently owned media voices that would remain in a given market post-combination. Specifically, pursuant to the amended rule, we allow the common ownership of one (or two) TV stations and six radio stations in the same market, if at least twenty independently owned media voices would remain in the market post-combination. In circumstances where we allow common ownership of two TV and six radio stations, we also allow common ownership of one TV and seven radio stations. Under our new rule, we allow common ownership of one (or two) TV stations and four radio stations in the same market, if at least ten independently owned media voices would remain in the market post-combination. We also allow common ownership of one (or two) TV stations and one radio station in the same market, without regard to the number of media voices that would remain post-combination. For purposes of the new radio/TV cross-ownership rule, we include as independently owned media voices in the market all independently owned and operating radio stations in the market, all independently owned and operating full-power TV stations in the market, independently owned cable systems (as one voice, if generally available in the TV station's DMA), and independently owned daily newspapers for which the circulation exceeds 5% of the households in the DMA.

43. Discussion. Petitioners raise a number of concerns about the application of our voice counts. As a preliminary matter, Clear Channel suggests that the *Report and Order* was not clear about the circumstances pursuant to which one entity may own one TV station and seven radio stations.[85] To the extent the *Report and Order* was unclear, we clarify that an entity may own such a combination only if it could own two TV stations and six radio stations, *i.e.*, only if it could satisfy the TV duopoly requirement that eight full-power independently owned and operating broadcast TV stations would remain in the DMA post-combination. We believe that construction of the rule to allow a combination of 1 TV/7 radio stations only where a combination of 2 TV/6 radio is possible best serves our competition and diversity goals. We believe that a combination of eight broadcast outlets should be permissible only under such circumstances where the more stringent duopoly test can be satisfied.

[84] *Id.* at ¶ 32.

[85] Clear Channel Opposition at 12-14.

44. *Broadcast Stations Counts*. UCC asks us not to count noncommercial broadcast stations, and that we count only those broadcast stations with a certain level of viewership in a DMA.[86] We reaffirm that we will count noncommercial stations, for the same reasons we stated above in the context of our duopoly rule. We also will not require broadcast stations to have a certain level of viewership before counting them. We believe that the assignment of a broadcast station to a particular market, and its continued success as a going concern, demonstrates that a station is a source of viable competition and diversity in a given market, and therefore should be counted.

45. Consistent with our decision not to count in the duopoly context Class A or LPTV stations for purposes of satisfying the requirement that eight independent TV broadcast stations must remain in the DMA post-merger, we wish to clarify on our own motion that we will not count in the radio/TV cross-ownership context either LPTV stations, including Class A stations, or low power FM (LPFM) stations for purposes of satisfying the requirement that a certain number of media entities must remain in the market post-combination. As we explained above in the duopoly context, LPTV stations, given their limited signal coverage, do not have sufficient influence and power to qualify as a station for purposes of our policy that a certain minimum number of stations must remain in a market post-combination. Likewise, the LPFM service is designed to serve small, localized communities; the strict limitation on their signal reach means that their programming will not be available to most of the market at issue in a proposed radio/TV combination.[87] Therefore, LPFM stations will not be counted in determining compliance with the requirement that a specified number of independently owned media voices must survive the formation of the combination at issue.

46. *Newspapers Counts*. Pursuant to our new rule, we include daily newspapers in our count of independently owned media voices if they are published in the DMA at issue and if they have a circulation in excess of 5% of the households in the DMA.[88] Clear Channel asks us to include a newspaper that owns a number of daily newspapers that have an aggregate circulation equal to or greater than 5% of the households in the DMA.[89] We decline to do so, because it is not consistent with our rationale for limiting the newspapers we include in our count of "media voices" to those with a circulation of at least 5% of the households in the DMA. As we explained in the *Report and Order*, "[o]ur intent in this regard is to include those newspapers that are widely available throughout the DMA and that provide coverage of issues of interest to a sizeable percentage of the population. Although we recognize that other publications also provide a source of diversity and competition, many of these are only targeted to particular communities and are not accessible to, or relied upon by, the population throughout the local market."[90] We reaffirm both our decision and our rationale.

[86] UCC at 20-21.

[87] LPFM stations will be authorized to operate with maximum facilities of 100 watts at 30 meters antenna height above average terrain (HAAT). 47 C.F.R. § 73.811(a). By contrast, the maximum effective radiated power for the most powerful full-power FM station is 100 kW at 600 meters HAAT. 47 C.F.R. § 73.211(b).

[88] 47 C.F.R. § 73.3555(c)(3)(iii); *Report and Order*, 14 FCC Rcd at 12952, ¶ 111.

[89] Clear Channel Opposition at 6-7.

[90] *Report and Order*, 14 FCC Rcd at 12953, ¶ 113.

3. Waivers

47. In the *Report and Order*, we held that we would presume it is in the public interest to waive the radio/TV cross-ownership rule if one of the stations is a failed station.[91] NAB asks that we also presume that waiver of the radio/TV cross-ownership rule is in the public interest if one of the stations is failing or not yet constructed, as we did in the context of the duopoly rule.[92] As we explained above, we revised our duopoly rule to a lesser extent than our radio/TV cross-ownership rule. We therefore presumed that we should waive the radio/TV cross-ownership rule to a lesser extent than the duopoly rule. We agree with UCC that "a waiver is a form of further liberalization of the rules,"[93] and thus believe that we struck the appropriate balance in our duopoly and radio/TV cross-ownership policies, in terms of our rules and presumptive waiver policies. We reaffirm our approach to our revised radio/TV cross-ownership policy "by amending the rule to provide a greater degree of common ownership of radio and television stations while at the same time limiting waivers of this new rule to only extraordinary circumstances."[94]

48. In the *Report and Order*, we also decided to grandfather any radio/TV combination formed pursuant to a waiver conditioned on the outcome of this proceeding, if applied for on or before July 29, 1999 (the "sunshine" notice for the *Report and Order*), and ultimately approved by the Commission.[95] We grandfathered these combinations through our 2004 biennial review, during which the Commission will review the radio/TV cross-ownership rule, and the conditional waivers.[96] UCC asks us to reconsider our grandfathering decision, and require all radio/TV combinations to comply with our new rules and waiver policies.[97] As we explained in the *Report and Order*, although the conditional waiver grantees knew that the continuation of any combinations they formed was subject to the outcome of this proceeding, we believed it was appropriate to grandfather the specified combinations because in many cases a significant period of time had passed since the grantees formed and made investments in their combinations.[98] We reaffirm both our decision and our rationale.

4. Transferability

49. In the *Report and Order*, we stated that, once formed, whether pursuant to the amended rule or waiver standard, a radio/TV combination could not be transferred unless it complies with the radio/TV cross-ownership rule or waiver standard in effect at the time of transfer.[99] Some parties

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[91] We define a failed station for purposes of our radio/TV cross-ownership waiver policies in the same manner as we defined it for our TV duopoly waiver policies. *Id.* at 12954, ¶ 115.

[92] NAB at 12-14.

[93] UCC Opposition at 8.

[94] *Report and Order*, 14 FCC Rcd at 12948, ¶ 103.

[95] *Id.* at 12957, ¶ 124.

[96] *Id.* at 12957-12958, ¶ 124.

[97] UCC at 22-23.

[98] *Report and Order*, 14 FCC Rcd at 12958, ¶ 125.

[99] *Id.* at 12948, ¶ 101; *id.* at 12954, ¶ 115.

ask us to reconsider our decision, for reasons similar to those they asked us to reconsider our same decision in the duopoly context.[100] We explained that we believe that we have properly harmonized changes in the marketplace with our competition and diversity goals by, on the one hand, not requiring combinations to divest broadcast stations when the market changes such that those combinations no longer comply with our rules and waiver policies, and, on the other hand, requiring combinations to comply with these rules and waiver policies at the time of transfer. We reaffirm our decision.

C. Television Local Marketing Agreements

50. Background. In our *Attribution Report and Order*, we adopted "a new rule to *per se* attribute television LMAs, or time brokerage of another television station in the same market, for more than fifteen percent of the brokered station's broadcast hours per week and to count such LMAs toward the brokering licensee's local ownership limits."[101] In the *Report and Order* in this proceeding, we concluded, as we proposed in the *Second Further Notice*,[102] to grandfather LMAs entered into before the adoption date of that notice (November 5, 1996) through the conclusion of our 2004 biennial review, and to require LMAs entered into on or after that date to comply with our TV duopoly rule within two years of the adoption date of the *Report and Order* (August 5, 1999).

51. Discussion. ALTV, LSOC, Pegasus, and Sinclair contend that we should have grandfathered *all* LMAs, and that our decision not to do so is contrary to section 202(g) of the Telecommunications Act of 1996.[103] This issue was already fully briefed and developed in the record that led to the *Report and Order*,[104] and we see no reason to disturb our decision or revisit our analysis in detail here. Section 202(g) states that "[n]othing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission." As we explained in the *Report and Order*, the express terms of the language indicate what section 202 was *not* intended to do, *i.e.*, prohibit LMAs, but it does not indicate what if anything else the section was intended to do.[105] We recognize that the Conference Report to the 1996 Act states that "[s]ubsection (g) grandfathers LMAs currently in existence upon enactment of this legislation and allows LMAs in the future, consistent with the Commission's rules. The conferees note the positive contributions of television LMAs and this subsection assures that this legislation does not deprive the public of the benefits of existing LMAs that were otherwise in compliance with the Commission regulations on the date of enactment." We agree with UCC that this language at best indicates that Congress intended the Commission to grandfather LMAs that were in existence as of the date of enactment, *i.e.*, February 8, 1996.[106] We have grandfathered those LMAs, as well as those entered into almost nine months

[100] For example, MMTC asks us to permit the transfer of radio/TV combinations intact to "socially and economically disadvantaged small business concerns" (SDBs), without regard to the rule or waiver policy in effect at the time of transfer. MMTC at 16-17.

[101] *Attribution Report and Order*, 14 FCC Rcd at 12597, ¶ 83.

[102] *Second Further Notice*, 11 FCC Rcd at 12694, ¶ 89.

[103] ALTV at 5-9; LSOC at 25-29; Pegasus at 5-8; Sinclair at 14-17.

[104] *Report and Order*, 14 FCC Rcd at 12959-12964, ¶¶ 130-142.

[105] *Id.* at 19261-12962, ¶¶ 134-136.

[106] UCC Opposition (to petitions for reconsideration in the attribution proceeding) at 6-7.

later when the Commission adopted the *Second Further Notice, i.e.*, November 5, 1996. Thus, we reject the argument that section 202(g) compels us to grandfather *all* LMAs entered into prior to the effective date of our new rules.[107]

52. Pegasus also requests that we grandfather LMAs if the two stations involved had programming relationships more extensive than an LMA (*e.g.*, if they were parent-satellite stations) prior to November 5, 1996, and then their programming relationship ultimately took the form of an LMA after the grandfathering date.[108] These events do not change the fact that any parties that entered into such LMAs did so after the explicit notice in the *Second Further Notice* that they did so at their own risk. Moreover, we do not believe that Pegasus has described circumstances that are likely to recur broadly enough to warrant an exception to our general decision not to grandfather LMAs entered into on or after November 5, 1996. Accordingly, we reaffirm that decision here.[109]

53. Our decision not to grandfather LMAs entered into on or after the adoption date of the *Second Further Notice* does not constitute retroactive rulemaking, as Pegasus suggests.[110] As the Supreme Court has stated, "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based on prior law."[111] Likewise, as the U.S. Court of Appeals for the District of Columbia Circuit has stated, "[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive rulemaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect."[112] In any event, parties to the non-grandfathered LMAs could not have had a reasonable expectation that their agreements and investments would be permissible, since when the Commission adopted the *Second Further Notice* on November 5, 1996, it gave explicit notice of its proposal not to grandfather non-compliant LMAs entered into on or after that date. We have not assessed a forfeiture or other penalty on parties to the non-grandfathered LMAs. We have not altered any reasonable expectations they had when they entered into these LMAs, or imposed any new duties on the parties to the LMAs. Rather, we held, after giving explicit notice of our proposal to do so, that non-compliant LMAs entered into on or after the date of that notice will not be grandfathered.

54. Nor does our decision not to grandfather LMAs entered into on or after the adoption date of the *Second Further Notice* constitute an unconstitutional taking of property in violation of the Fifth

[107] We similarly reject the argument that we did not "grandfather," but rather "sunset," LMAs entered into before the adoption date of the *Second Further Notice*. As we explained in the *Report and Order*, grandfather provisions do not necessarily involve the permanent exemption from the reach of a regulation or statute. 14 FCC Rcd at 12962, ¶ 136.

[108] Pegasus at 41-42.

[109] Pegasus has described, however, unusual circumstances in the Wilkes Barre/Scranton DMA, involving applications that were filed before but granted after the grandfathering date, and stations that originally had a parent-satellite relationship and then followed by an LMA relationship, that may warrant a case-specific waiver of the grandfathering date. We believe these circumstances would be best addressed on a case-by-case basis.

[110] Pegasus at 8-13.

[111] *Landgraf v. USI Film Prods.*, 511 U.S. 265, 269 (1994).

[112] *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989).

Amendment, as Sinclair suggests.[113] As a preliminary matter, it is doubtful whether an LMA constitutes a cognizable "property" interest for takings purposes.[114] Yet even assuming that the parties to LMAs could satisfy the threshold question of whether they have a property interest, our decision not to grandfather LMAs entered into after the *Second Further Notice* does not constitute a taking.[115] Parties to nongrandfathered LMAs entered them after the Commission made the following statements in the *Second Further Notice*: "[T]elevision LMAs entered into on or after the adoption date of this *Notice* would be entered into at the risk of the contracting parties. Consequently, if these latter television LMAs result in a violation of any Commission ownership rule, they would not be grandfathered and would be accorded only a brief period in which to terminate."[116] Any party that subsequently chose to enter into an LMA cannot now be heard to argue that the Commission's action – which is well within our authority – interfered with their reasonable investment-backed expectations.[117] Indeed, we gave these parties an ample two-year period in which to terminate their LMAs in order "to avoid undue disruption of existing arrangements and [to] allow the holders of LMAs to order their affairs."[118]

55. As for grandfathered LMAs, we decline MMTC's request that we eliminate these LMAs if by 2004 minority or SDB ownership has fallen by 10%.[119] We reaffirm our approach in the *Report*

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[113] Sinclair at 19-22.

[114] An LMA is an agreement concerning the use of a radio license, in which the licensee has no property interest. Section 301 of the Act states that "[i]t is the purpose of this Act, among other things, to maintain the control of the United States over all channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof. . . and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301. Courts have held that licensees have no property rights in a broadcast radio license. *See, e.g., Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 331 (1945) (stating that "[n]o licensee obtains any vested interest in any frequency"); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940) (stating that "[t]he policy of the Act is clear that no persons is to have anything in the nature of a property right as a result of the granting of such a license").

[115] The Supreme Court evaluates takings claims on an ad-hoc, case-by-case basis, but has identified the following as relevant factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with investment-backed expectations; and (3) the character of the governmental action. *Penn Central Transportation Co. v. New York City*, 438, U.S. 104, 124 (1978). Any single factor may determine whether there is or is not a taking. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (Court found no taking based only on degree of interference with investment-backed expectations because it found that factor alone to be "so overwhelming . . . that it disposes of the taking question").

[116] 11 FCC Rcd at 21694, ¶ 89.

[117] As the Supreme Court has said, " '[c]ontracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. . . .' If the regulatory statute is otherwise within the powers of Congress, . . . its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986) (quoting *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-08 (1935) and otherwise citing *Bowles v. Willingham*, 321 U.S. 503, 517 (1944); *Omnia Commercial Co. v. United States*, 216 U.S. 502, 508-510 (1923).

[118] *Report and Order*, 14 FCC Rcd at 12964, ¶ 142.

[119] MMTC at 11-12. MMTC also asks us to eliminate "grandfathering" of LMAs entered into on or after November 5, 1996, if minority or SDB ownership has fallen by 10% by 2001. *Id.* In making such a request,

and Order to decide the status of grandfathered LMAs in tandem with, or not later than, our 2004 biennial review of our broadcast cross-ownership rules.

D. First Amendment Arguments

56. Background. In the *Report and Order*, we explained that "[a]ll of our broadcast cross-ownership and multiple ownership rules, including the 'TV duopoly' and 'one-to-a-market' rules at issue in this proceeding, are based on the 'twin goals' of competition and diversity."[120] Our competition goal seeks to ensure that broadcasters do not obtain market power, to the detriment of advertisers, other competitors, and the public.[121] Our diversity goal seeks to ensure that the public has access to information from a variety of diverse and antagonistic sources.[122]

57. Discussion. Pegasus contends that our diversity rationale violates the First Amendment, for a variety of reasons.[123] In essence, Pegasus argues that our diversity goal, "standing alone" and without a scarcity of video programming alternatives, cannot sustain our cross-ownership and multiple ownership rules,[124] and that even if this goal were sufficiently important for First Amendment purposes, our ownership rules are not sufficiently tailored to achieve that goal.[125]

58. We disagree. Aside from the fact that Pegasus ignores the competition basis for our rules, our diversity goal and means of promoting that goal are consistent with the First Amendment. To the extent our ownership rules implicate First Amendment concerns, the Supreme Court has noted that they are content-neutral.[126] According to the applicable test, "[a] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech, and does not burden substantially more speech than necessary to further those interests."[127] In the *Report and Order*, we explained at length the basis for our conclusion that our ownership rules advance the important governmental interests of competition and diversity, and do so in a particularly nonburdensome way for purposes of the First Amendment.[128] Pegasus has not provided any reason for us to reconsider that conclusion. We also note that, in order for the rules to apply to entities and individuals, those entities or individuals must

MMTC appears to have misunderstood that parties must terminate all LMAs entered into on or after November 5, 1996 within two years of the adoption date of the *Report and Order*, *i.e.*, August 5, 2001, regardless of minority or SDB ownership or any other factors. *Report and Order*, 14 FCC Rcd at 12964, ¶ 142. Thus, we reject MMTC's argument as moot.

[120] *Report and Order*, 14 FCC Rcd at 12910, ¶ 15.

[121] *Id.* at 12916, ¶ 26.

[122] *Id.* at 12911, ¶ 17.

[123] Pegasus at 13-33.

[124] *Id.* at 13-19.

[125] *Id.* at 19-27.

[126] *See, e.g., National Citizens Committee for Broadcasting v. FCC*, 436 U.S. 775, 801 (noting that the newspaper/broadcast cross-ownership rule was content neutral).

[127] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997).

[128] *Report and Order*, 14 FCC Rcd at 12910-12924, ¶¶ 15-41. *See especially id.* at 12915, n.49.

already own a broadcast outlet in the *same market*. Our rules and waiver policies are designed to ensure that others have an opportunity to own an outlet in the market before an entity or individual with one or more outlets already in a given market obtains another one. Our rules thus foster, rather than impede, the values underlying the First Amendment, as the Supreme Court has recognized.[129]

IV. ADMINISTRATIVE MATTERS

59. Authority for issuance of this *Memorandum Opinion and Second Order on Reconsideration* is contained in sections 4(i), 303(r), 403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 403, and 405.

60. *Paperwork Reduction Act Analysis*. The actions taken in this *Memorandum Opinion and Second Order on Reconsideration* have been analyzed with respect to the Paperwork Reduction Act of 1995, and found to impose no new or modified reporting and record-keeping requirements or burdens on the public.

61. *Supplemental Final Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act,[130] the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) of the possible impact on small entities of the rules adopted in this *Memorandum Opinion and Second Order on Reconsideration*.[131] The Supplemental FRFA is set forth in Appendix C.

V. ORDERING CLAUSES

62. Accordingly, IT IS ORDERED that the petitions for reconsideration or clarification are GRANTED to the extent provided herein and otherwise ARE DENIED IN PART pursuant to sections 4(i), 303(r), 403, and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), 403, and 405, and section 1.429 of the Commission's rules, 47 C.F.R. § 1.429(i).

63. IT IS FURTHER ORDERED that, pursuant to sections 4(i) & (j), 303(r), 307, 308, 308, and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) & (j), 303(r), 307, 308, and 309, Part 73 of the Commission's rules, 47 C.F.R. Part 73, IS AMENDED as set forth in Appendix B.

64. IT IS FURTHER ORDERED that, pursuant to the Contract with America Advancement Act of 1996, the rule amendments set forth in Appendix B SHALL BECOME EFFECTIVE sixty days after publication in the Federal Register.

65. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Memorandum Opinion and Second Order on Reconsideration in MM Docket Nos. 91-221 and 87-8, including the Supplemental Final

[129] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment").

[130] 5 U.S.C. § 601 *et seq.*

[131] 5 U.S.C. § 604.

Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

66. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A
PLEADINGS
in MM Docket Nos. 91-221, 87-8

PETITIONS FOR RECONSIDERATION

Aries Telecommunications Corp. (Aries)
Association of Local Television Stations, Inc. (ALTV)
Blade Communications, Inc. (Blade)
CBS Corp. (CBS)
Clear Channel Communications, Inc. (Clear Channel)
Kenkel & Assocs. (Kenkel)
LIN Television Corp. (LIN)
Local Stations Ownership Coalition (LSOC)
Minority Media and Telecommunications Council (MMTC)
National Association of Broadcasters (NAB)
Paxson Communications Corp. (Paxson)
Pegasus Communication Corp. (Pegasus)
Sinclair Broadcast Group, Inc. (Sinclair)
United Church of Christ et al. (UCC)

OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

Clear Channel Communications, Inc. (Clear Channel)
Local Station Ownership Coalition (LSOC)
National Association of Broadcasters (NAB)
United Church of Christ (UCC)
WMTW Broadcast Group, LLC (WMTW)

REPLIES TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

Minority Media Telecommunications Council (MMTC)
National Association of Broadcasters (NAB)
Pegasus Communication Corp. (Pegasus)
United Church of Christ (UCC)

APPENDIX B

RULES

Part 73 of Title 47 of the U.S. Code of Federal Regulations is amended as follows:

Part 73 RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. §§ 154, 303, 334.

2. Section 73.3555 is amended by revising paragraphs (b)(2)(iii) and (c)(3)(I) and Note 7 (2) to read as follows:

§ 73.3555 Multiple Ownership.

* * * * *

(b) *Local television multiple ownership rule.* An entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) only under one or more of the following conditions: * * *

(2) * * *

(ii) at least 8 independently owned and operating, full-power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of the TV stations in question are located. Count only those stations the Grade B signal contours of which overlap with the Grade B signal contour of at least one of the stations in the proposed combination. In areas where there is no Nielsen DMA, count the TV stations present in an area that would be the functional equivalent of a TV market. Count only those TV stations the Grade B signal contours of which overlap with the Grade B signal contour of at least one of the stations in the proposed combination.

(c) *Radio-television cross ownership rule.* * * *

(3) To determine how many media voices would remain in the market, count the following:

(i) TV stations: independently owned and operating full-power broadcast TV stations within the DMA of the TV station's (or stations') community (or communities) of license that have Grade B signal contours that overlap with the Grade B signal contour(s) of the TV station(s) at issue; * * *

APPENDIX C

SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),[132] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking* (*Notice*),[133] the *Further Notice of Proposed Rule Making* (*Further Notice*),[134] and the *Second Further Notice of Proposed Rule Making* (*Second Further Notice*)[135] in this proceeding. The Commission sought written public comment on the proposals in the *Notice*, the *Further Notice*, and the *Second Further Notice*, including comment on the IRFAs. The comments received were discussed in the Final Regulatory Flexibility Analysis (FRFA) contained in the *Report and Order* in this proceeding.[136] As described below, this *Memorandum Opinion and Second Order on Reconsideration* grants reconsideration of some actions taken in the *Report and Order*, and provides clarification of other issues. This associated Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) addresses the rule modifications on reconsideration and conforms to the RFA.[137]

Need for, and Objectives of, the *Memorandum Opinion and Second Order on Reconsideration*

In the *Report and Order*, adopted August 5, 1999, the Commission revised its local television ownership rules – the local television multiple ownership rule, or TV duopoly rule, and the radio/TV cross-ownership rule – and also adopted grandfathering policies for certain television local marketing agreements and radio/TV combinations. The Commission received fourteen petitions for reconsideration of the new rules and grandfathering policies. The *Memorandum Opinion and Second Order on Reconsideration* resolves these petitions and associated pleadings, consistent with the Commission's overall goals in the proceeding. These Commission's goals were to balance two of its most fundamental goals in broadcast ownership – fostering competition in the markets in which broadcast stations compete, and preserving a diversity of information sources, especially at the local level – with the efficiencies of common ownership and increased competition in the media marketplace.

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[132] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[133] Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, MM Docket Nos. 91-221 & 87-8, *Notice of Proposed Rulemaking*, 7 FCC Rcd 4111, 4120 (1992) (*Notice*).

[134] Review of the Commission's Regulations governing television Broadcasting, Television Satellite Stations, Review of Policy and Rules, MM Docket Nos. 91-221 & 87-7, *Further Notice of Proposed Rulemaking*, 10 FCC Rcd 3524, 3586 (1995) (*Further Notice*).

[135] Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, MM Docket Nos. 91-221 & 87-8, *Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21655, 21698-21703 (1996) (*Second Further Notice*).

[136] *Report and Order*, 14 FCC Rcd 12,903, 12,968-12,974 (1999).

[137] *See* 5 U.S.C. § 604.

Summary of Significant Issues Raised by the Public

The comments in response to the IRFAs that addressed small business issues were discussed in the FRFA contained in the *Report and Order* in this proceeding. The Commission received no petitions for reconsideration in direct response to the FRFA.

Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

The rules revisions contained in this *Memorandum Opinion and Second Order on Reconsideration* will apply to commercial television and radio broadcast licensees, and potential licensees and permittees. These entities are discussed in detail in the FRFA contained in the *Report and Order* at Section III.[138]

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

No new recording, recordkeeping or other compliance requirements are adopted.

Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

The *Memorandum Opinion and Second Order on Reconsideration* generally affirms and clarifies the *Report and Order*, but it also modifies the TV duopoly and radio/TV cross-ownership rule. As explained below, this change relates to the standard the Commission uses to determine if the necessary circumstances are present to approve a particular combination. As also explained below, the Commission has considered how this change affects small entities, and taken steps to minimize significant economic impact on them.

The duopoly rule, as revised in the *Report and Order*, permits common ownership of two TV stations in the same market, defined by Designated Market Areas (DMAs), if, among other things, eight independently owned and operating full-power TV stations would remain post-merger in the DMA in which the communities of license of the TV stations in question are located. In its petition for reconsideration, the Office of Communications, Inc. of the United Church of Christ *et al.* (UCC) argued that there are some geographically large DMAs where counting every TV station in the DMA may produce results at odds with the Commission's goal of establishing a minimum level of diversity in a particular community. For example, the rule, as revised in the *Report and Order*, allows a potential duopoly to count toward the eight-station minimum even those stations in the DMA that cannot be received over the air by viewers in the area where the potential duopoly will be located, because the Grade B signal contours of those stations do not reach that area. The Commission therefore modifies the duopoly rule to count only those stations that have a Grade B signal contour that overlaps with the Grade B signal contour of at least one of the stations in the proposed duopoly. In the interest of consistency, the Commission also modifies the radio/TV cross-ownership rule to count toward the minimum number of media entities necessary for a particular combination only those TV stations within the DMA of TV station(s) at issue, and that have Grade B signal contours that overlap the Grade B signal contour(s) of the TV station(s) at issue.

The rules as revised in the *Memorandum Opinion and Second Order on Reconsideration* strike what we believe to be the appropriate balance between allowing broadcast stations to realize the efficiencies of combined operations, and furthering our policy goals of competition and diversity.

[138] *Report and Order*, 14 FCC Rcd. at 12,969-12,973.

The rules tighten the showing necessary for common ownership, and thereby prevent stations in the market from obtaining and exercising market power at the expense of smaller stations. For example, consider a DMA that includes nine TV stations, six of which broadcast from hypothetical City A, and the other three of which broadcast from hypothetical City B. The signal contours of the stations in City A do not reach viewers in City B, and vice versa. The rule, as revised in the *Report and Order*, would permit two of the three stations in City B to combine, with the possible result that they could obtain and exercise market power at the expense of the third station in City B. The rule as revised in the *Memorandum Opinion and Second Order on Reconsideration* would not permit any of the stations in City B to combine with each other. (It would, however, permit one station in City A to combine with one station in City B, leaving eight TV stations in the DMA.) Thus, the alternative considered of affirming the rule as revised in the *Report and Order* could have enabled a smaller station's competitors to obtain and exercise market power.

In tightening the circumstances under which two stations can combine, we recognize that our new rule may not just protect smaller stations, but instead may hamper their ability to combine, reduce costs, and compete more effectively. We note, however, that the rules, as revised in the *Report and Order*, and affirmed in the *Memorandum Opinion and Second Order on Reconsideration*, permit struggling stations to combine when one of them has failed or is failing, or the combination of the two would result in the construction of an authorized but as yet unconstructed station.

For the above reasons, we believe that the Commission has taken steps to minimize significant economic impact on a substantial number of small entities.

Report to Congress

The Commission will send a copy of this *Memorandum Opinion and Second Order on Reconsideration*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[139] In addition, the Commission will send a copy of this *Memorandum Opinion and Second Order on Reconsideration*, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *Memorandum Opinion and Second Order on Reconsideration* and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.[140]

[139] *See* 5 U.S.C. § 801(a)(1)(A).

[140] *See* 5 U.S.C. § 604(b).

In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221; Television Satellite Stations Review of Policy and Rules, MM Docket No. 97-8.

Dissenting Statement of Commissioner Harold W. Furchtgott-Roth

I respectfully dissent from this Memorandum Opinion and Second Order on Reconsideration, which generally affirms the decisions made in the original Report and Order on local ownership of mass media entities. I do so for the reasons given in my dissenting statement in that Report and Order. [1]

[1] *See* Dissenting Statement of Commissioner Harold W. Furchtgott-Roth, *Report & Order, Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, 14 FCC Rcd. 12903 (1999).